NO. 22624

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES HOLLYFIELD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF PROCEEDINGS

On June 28, 1967, the Federal Grand Jury for the Central District of California returned an eight-count indictment naming appellant JAMES HOLLYFIELD and seven codefendants. All were named as defendants in Count One charging a conspiracy to steal mail from authorized depositories, and to use the information secured from the mails to make fraudulent withdrawals from depositors' accounts. In addition, appellant Hollyfield was named in Counts Six and Seven, charging unlawful possession of stolen mail. 1/ [C. T. 2-11]

1/ C. T. refers to Clerk's Transcript.

On November 7, 1967, a jury trial commenced before the Honorable Peirson M. Hall, United States District Judge, in which appellant Hollyfield was tried along with defendants Leroy Ray and Vincent Stafford Hill.

On November 16, 1967, the jury returned a verdict of guilty as to all defendants on all counts, including Counts One, Six and Seven, as to appellant Hollyfield [C. T. 71].

On December 11, 1967, appellant Hollyfield was committed to the custody of the Attorney General for five years on each of the three counts, with the sentence on Counts Six and Seven to run concurrently with the sentence on Count One, and with each other. Both defendants Hill and Ray were also sentenced to five years' imprisonment. [C. T. 75].

Appellant Hollyfield and defendant Ray filed notices of appeal on December 12, 1967 [C. T. 78-79]. A notice of appeal was not filed on behalf of defendant Vincent Hill.

II

STATEMENT OF FACTS

During the spring of 1967, the defendants planned a scheme to steal mail matter from the United States mails and to use the banking information contained in the stolen mail to effect fraudulent withdrawals from banking institutions.

The manner in which the scheme operated followed a consistent pattern. A letter addressed to a bank or savings and loan

association and containing either a passbook, account number, and specimen signatures, would be placed in the United States mails by a depositor [2/] [R. T. 33-34, 49, 115, 130, 133-134]. The envelope would then be stolen from the mails [R. T. 255-258], the banking information would be removed [R. T. 260-261], the rifled envelope would on occasion be returned into the mails and found in another mail box or at the Terminal Annex Post Office [R. T. 445], and, lastly, the information would be used (1) either to provide a specimen name or signature for the forging of a stolen check [R. T. 369-370, 375-376], which would be cashed at a bank [R. T. 45, 47, 268], or (2) more frequently to provide specimen signatures and the bank account numbers for fraudulent withdrawals from the account at the bank or savings and loan association [R. T. 28, 35, 52-55, 265-267].

An example of how the scheme was put into effect can be seen from the incident involving the check of one June Banks [Gov. Ex. 1]. On April 1, 1967, John Banks mailed a check in the sum of $123.59, endorsed by his wife, June Banks [Gov. Ex. 1], at a post box at Willoughby and Las Palmas in Los Angeles [R. T. 33-34]. The check was for deposit at the Bank of America, Whittier, California.

That very evening the letter and its contents were among numerous others stolen in a burglary of over ten mail boxes in Hollywood [R. T. 258]. One of the codefendants, JACQUELINE R. DUNN, was a passenger in an automobile which drove from

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2/ R. T. refers to Reporter's Transcript.

mail box to mail box in Hollywood from which numerous items were stolen [R. T. 255-259]. One CLARICE BERRYHILL was the individual who physically removed the mail from the boxes [R. T. 256].

The mail boxes were all entered with the use of a United States mail key [R. T. 256-257]. It was on October 31, 1965, that 50 such master mail keys were stolen in a burglary of the La Tijera post office in Los Angeles [R. T. 18-20]. Each of these master keys would open over 8,000 corner mail boxes in the Los Angeles area [R. T. 21].

The mail stolen on the evening of April 1, 1967, was all sorted at a location in Los Angeles and the contents of the letter mailed by Mr. Banks were among those chosen for a fraudulent attempt to obtain money from the bank [R. T. 259-261].

On April 5, 1967, after observing Clarice Berryhill in conversation with defendant Leroy Ray, Jacqueline Dunn was driven by Clarice Berryhill to the Bank of America in Whittier where June Banks had her account [R. T. 262-263]. Jacqueline Dunn had previously been trained to be a runner in the scheme by Leroy Ray. Following Ray's initial meeting with Dunn in February, 1967, she had been instructed in the manner of practicing specimen signatures to forge the signatures of various account holders, and to enter banks and pose as the account holder to obtain a withdrawal [R. T. 241-245].

Part of the scheme also required false identifications, the most prominent being California driver's licenses. It was

near the end of March, 1967, that Jacqueline Dunn was present in the apartment of Leroy Ray in Los Angeles and saw some of the paraphernalia used in making false California driver's licenses. These included numerous licenses themselves along with a rubber date stamp [Gov. Ex. 24-B], ink pads [Gov. Ex. 24, 24-A], and a United States quarter that was used to imitate the seal of the State of California on the reverse of the California driver's licenses [Gov. Ex. 24-A; R. T. 249-252]. In fact, Leroy Ray had actually made up a false driver's license for Miss Dunn shortly before that occasion [R. T. 251].

On this particular occasion at the Bank of America, Whittier, however, no false identification was used. Instead, Jacqueline Dunn arrived at the bank and after practicing a specimen signature, handed the teller, Kathleen Rosseen, a piece of paper with the name 'June Banks' on it [R. T. 264-267]. Miss Dunn, in addition, identified herself as June Banks [R. T. 266]. Unfortunately for Jacqueline Dunn, another teller working at the bank at the same time happened to be the real June Banks [R. T 36-38]. She resided in Hollywood, was employed at the Bank of America in Whittier, and happened to be banking by mail. The Whittier Police were immediately summoned and Jacqueline Dunn's attempted withdrawal was unsuccessful [R. T. 38, 267].

Another example of how the scheme operated is clearly seen in the following events in April, 1967. On the morning of April 4, 1967, a Mrs. Nathan Lipschultz placed two letters on her mail box for pickup by the mail carried [R. T. 48-49]. Each

letter was addressed to the Southern California Savings and Loan Association, 9250 Wilshire Boulevard, Beverly Hills. One letter bore her return address and contained her passbook to her savings and loan account at the institution [R. T. 49]. The other letter belonged to the sister of Mrs. Lipschultz, a Mrs. Inez Wilson [R. T. 49]. This other letter bore the return address of Mrs. Wilson and contained her passbook to the same institution [R. T. 49]. A short time after placing the letters on the mail box, Mrs. Lipschultz observed that they were not there and found that the mailman had not been to her address to effect delivery [R. T. 50]. Exactly six days later on April 10, 1967, the sum of $10,000 was withdrawn from the account of Mrs. Lipschultz at the Southern California Savings and Loan Association [R T. 52-55]. It was on April 12, 1967, only two days later, that an attempt was made to effect another $10,000 withdrawal from the association, this time from the account of Mrs. Inez Wilson [R. T. 69-72]. On this date, defendant Leroy Ray drove defendant Carroll Ellen Nutter to that institution, at which time she attempted a fraudulent withdrawal [R. T. 80]. This time, however, she was unsuccessful and left the area in an Oldsmobile driven by Leroy Ray [R. T. 97], and registered to him [Gov. Ex. 9]. The original mailing envelope [Gov. Ex. 4], and the passbook [Gov. Ex. 4-A], of the Lipschultz account were recovered incident to the arrest of defendant Vincent Hill on April 28, 1967, at 4800 August Street, Apartment 4, Los Angeles [R. T. 397-399]. Fingerprints of defendant Hill were found on the Lipschultz passbook [Gov. Ex. 4-A].

In addition, a fictitious California driver's license in the name of Inez Wilson and bearing the photograph of Carroll Ellen Nutter were recovered incident to the arrest of Leroy Herbert Ray on April 28, 1967 [R. T. 436].

In addition to the two letters containing passbooks to the Southern California Savings and Loan, Mrs. Lipschultz also mailed a letter on April 4, 1967, to Dr. S. D. Daniels, containing her check No. 435, in the amount of $94.00 [R. T. 53-54] [Gov. Ex. 5]. The original check content was recovered incident to the arrest of Vincent Hill on April 28, 1967 [R. T. 436], and two prints of defendant Hill were found on that check [R. T. 151].

An example of the use of banking information for use in forging a stolen check is found in the incident involving Mrs. Carl Cotterell. On the evening of April 13, 1967, Mrs. Cotterell observed her son mail checks with signatures and account number at a collection box at Fourth Avenue and Country Club Drive in Los Angeles [R. T. 40-41]. One day later, April 14, 1967, Jacqueline Dunn was driven by Leroy Ray to the vicinity of Crocker Citizens National Bank, Pico-Bronson Branch, Los Angeles [R. T. 268-270]. Defendant Ray gave Jacqueline Dunn a check dated April 14, 1967, in the sum of $289.50 [R. T. 267] [Gov. Ex. 3]. This was one of a series of checks that had been stolen in blank from the Neal Coffee Corporation, Los Angeles, on February 15, 1967 [R. T. 369-370]. This check bore the purported signature of Edith Cotterell [R. T. 41-42]. This was not her signature [R. T. 42] and Jacqueline Dunn was unsuccessful

in attempting to cash this forged check at the Crocker Citizens Bank [R. T. 270-272].

Another instance of the use of stolen mail to provide names and signatures for stolen checks relates to the incident involving Mr. and Mrs. Walter Jesperson. On March 20, 1967, Mr. Jesperson mailed three letters in a collection box at Mansfield and Rosewood in Los Angeles [R. T. 133-136]. These were an envelope addressed to the Los Angeles Times [Gov. Ex. 13], containing his check No. 480, and an envelope addressed to Atlantic-Richfield Company, Los Angeles [Gov. Ex. 15], containing a check No. 481 [Gov. Ex. 14-A], and a statement of the amount due [Gov. Ex. 15-B], and an envelope to Allstate Credit Corporation [Gov. Ex. 16], containing a check No. 482 [Gov. Ex. 16-A], and a statement [Gov. Ex. 16-B]. All three rifled envelopes were recovered from a different collection box located at Las Palmas and Willoughby on the morning of April 21, 1967 [R. T. 388-392, 445]. On the morning of April 29, 1967, check No. 480 [Gov. Ex. 14], which had been contained in the envelope addressed to the Los Angeles Times [Gov. Ex. 13], was recovered from the person of James Hollyfield incident to his arrest by the Los Angeles Police Department [R. T. 178]. Furthermore, James Hollyfield had on his person a check stolen in the burglary of the Fort Inn, Wilmington, California [R. T. 178] [Gov. Ex. 17]. On February 21, 1967, a substantial quantity of blank checks were stolen from the Fort Inn [R. T. 375-376]. The check that Hollyfield had on his person was now made out in the amount of $279.14,

dated April 25, 1967, and made payable to the person whose mail had been stolen on March 20th, namely, Mr. Walter Jesperson [Gov. Ex. 17]. Mr. Jesperson, of course, had no business connection with the Fort Inn and had no knowledge of the insertion of his name as payee on the stolen check. It is to be noted that an expert witness from the Scientific Investigation Detail of the Los Angeles Police Department testified that he examined the check protector imprint on this stolen check that was in Hollyfield's possession [Gov. Ex. 17], with the check protector imprint on the other stolen check that bore the endorsement of Edith Cotterell [Gov. Ex. 3], that defendant Ray had given Miss Dunn to cash at Crocker Citizens Bank on April 14, 1967 [R. T. 267], and it was his opinion that both imprints on the stolen checks were in all probability made by the same check protector [R. T. 477-478].

Another check that was found on the person of James Hollyfield incident to his arrest was one actually stolen from the mail. On April 26, 1967, Daisy Espino mailed a letter containing a check to a Bank of America branch in Huntington Park, California [R. T. 115] [Gov. Ex. 12]. This was mailed in a collection box located in front of a post office located at Florence and Compton in Los Angeles [R. T. 115]. It was only three days later that defendant Hollyfield had this check in his possession [R. T. 178].

III

QUESTIONS PRESENTED

1. Whether the trial court erred in not granting defendant's motion to dismiss the indictment and suppress the evidence on the grounds that the evidence was obtained in violation of the Fourth and Fifth Amendments to the United States Constitution.
2. Whether the trial court committed plain error by its statement relating to the quantum of evidence showing conspiracy.

IV

ARGUMENT

A. SINCE THE OFFICERS' ENTRY WAS CONSENTED TO AND SINCE THE EVIDENCE DISCOVERED INSIDE THE RESIDENCE WAS NOT THE RESULT OF A SEARCH BUT CONSTITUTED SUFFICIENT PROBABLE CAUSE FOR ARREST, APPELLANT'S ARREST AND SEARCH INCIDENT THERETO WERE LEGALLY VALID.

Subsequent to the arrest of the appellant for marihuana violations, a detailed search of his person at the police station turned up several stolen checks ultimately used as evidence at trial. Appellant contends that the court erred in denying his motion to suppress this evidence seized after arrest. Essentially

the appellant's contention appears to be that, while the search incident to the arrest was valid in itself, the arrest itself was not valid, either because it resulted from an illegal entry which tainted the subsequent observations of the police which in turn led to the arrest; and/or because the observations of the police (marihuana odor and evidence of marihuana cigarettes) provided an insufficient basis for probable cause for arrest.

1. The Police Officers' Entry Into Appellant's Residence Was Valid And Consented To.

Both arresting officers testified that they went to the appellant's residence in answer to complaints of noise from this apartment. They knocked on his door, appellant opened it and, knowing why the police were there, "he told us to come in." [R. T. 177-78, 192-94, 228]. Thus, the facts present a situation where officers are invited onto the premises, having no intent to arrest the appellant or search the area. See Thompson v. United States, 382 F. 2d 390, 393 (9th Cir. 1967); United States v. Barone, 330 F. 2d 543 (2d Cir.), cert. denied 377 U. S. 1004 (1964); Davis v. United States, 327 F. 2d 301, 303 (9th Cir. 1964). The officers, as appellant was aware, were responding to a complaint of noise and thus entered as part of their normal duties. Whether the sworn testimony of the officers -- that their entry was consented to, under no circumstances of coercion, stealth, or duress -- is to be believed was a question of fact for the trial

court. Redmon v. United States, 355 F. 2d 407, 411 (9th Cir. 1966); Davis v. United States, supra, at 304-05; United States v. Page, 302 F. 2d 81, 82-85 (9th Cir. 1962) (en banc). The determination of this fact is thus binding, unless so obviously mistaken as to be "clearly erroneous". United States v. Page, supra, at 85. See also Nelson v. People, 346 F. 2d 73, 77 (9th Cir. 1965).

2. Once Inside Defendant's Premises, The Officers Conducted No "Search".

There can hardly be doubt that once legally inside the premises, what police officers see in plain view is not to be deemed a discovery due to a "search". Ker v. California, 374 U. S. 23, 43 (1962) (brick of marihuana seen on scale in kitchen; no search); Davis v. United States, supra, (wastebasket containing marihuana seen within five feet of door; no search). See also United States v. Lefkowitz, 285 U. S. 452, 465 (1932); United States v. Lee, 274 U. S. 559 (1927); United States v. Barone, supra; People v. West, 144 Cal. App. 2d 214, 300 P. 2d 729 (1956). And such rationale is not restricted to the immediate view of the officers at the doorway. Ker v. California, supra, (evidence in kitchen through another doorway); United States v. Barone, supra, (counterfeit bills floating in toilet in adjoining bathroom; no search); Davis v. United States, supra, (marihuana found in wastebasket in adjoining bathroom).

In the present case, the officers smelled the odor of what

they determined to be marihuana upon entering the premises [R. T. 180, 198, 229-30]. Without moving, they saw the tell-tale "zig-zag" paper used to roll marihuana cigarettes [R. T. 182]. Unusually colored cigarette butts, characteristic of marihuana, were in an ashtray plainly visible in an adjoining room [R. T. 181-182]. One officer, taking only a few steps, picked up and examined one of these butts, determining it to be marihuana [R. T. 183]. At this point, the defendant was arrested [R. T. 183]. Thus, applying the relevant case law, it is evident that the officers conducted no search prior to the arrest, yet "were not required to remain blind to the obvious". Davis, supra, at 305.

3. There Was Probable Cause To Arrest Defendant For Marihuana Violations.

The arrest in this case was effected by Los Angeles police officers for violation of a California statute. The states may work out their own rules governing arrests, provided that these rules stay within the Fourth Amendment and within the rule that illegally seized evidence is inadmissible at trial. Beck v. Ohio, 379 U.S. 89, 92 (1964); Ker v. California, 374 U.S. 23, 37 (1963); United States v. DiRe, 332 U.S. 581, 589 (1948). The validity of this arrest is therefore to be determined by state law, within the bounds of the United States Constitution. Ker, supra at 37; Wartson v. United States, ___F. 2d ___ (9th Cir.) No. 21,830 August 21, 1968, Slip. Op. at 4; Dagampat v. United States,

352 F. 2d 245 (9th Cir.) cert. denied 383 U S. 950 (1965); Lipton v. United States, 348 F. 2d 591, 594 (9th Cir. 1965); Burks v. United States, 287 F. 2d 117.

California Penal Code, Section 836, provides that:

> "A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:
>
> "1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
>
> "2. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in face been committed."

The test of reasonable cause for arrest has been stated to be whether there is,

> "more evidence for than against, so that a man of ordinary care and prudence, knowing what the arresting officer knows, would be led to believe or conscientiously entertain a strong suspicion of the accused's guilt, although reserving some possibility for doubt."

People v. Murietta, 60 Cal. Rptr. 56, 57, 251 A. C. A. 1147, 1148 (1967).

See also People v. Dabney, 59 Cal. Rptr. 243, 250 A. C. A. 1078 (1967).

"[P]robable cause [exists] . . . 'where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' "

Ker v. California, supra, at 35, quoting Brinegar v. United States, 338 U.S. 160, 175-176 (1949);

Carroll v. United States, 267 U.S. 132, 162 (1925).

In this case, the facts relied upon for justifying the arrest were the odor of recently burnt marihuana, and the paper used and examination of the butts from such cigarettes.

The Supreme Court of the United States has noted that,

" . . . We cannot sustain defendant's contention that odors [of narcotics] . . . cannot be evidence sufficient to constitute probable grounds for any search."

Johnson v. United States, supra, at 13;

and,

"A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists . . . "

United States v. Ventresca, 380 U.S. 102, 111 (1965); see also Rugendorf v. United States, 376 U.S. 528 (1964).

In the present case, the officers testified to training and long experience in marihuana detection [R T. 181]. The case law supports the contention that the factual situation, viewed from the vantage of such experiencd, provided probable cause for arrest.

In People v. Lee, 260 A. C. A. 885 (1968), the police stopped a car for absence of a license plate. An officer leaned over to question the driver and detected what he determined to be marihuana smoke. Ordering defendant out of the car, he noted that defendant's pupils were dilated and his speech was slurred. These facts alone sufficed for probable cause for arrest for marihuana violations and justified search incident to arrest. Similarly, in other cases, the odor of burning marihuana and the suspect's physical appearance, judged in light of the officers' training and experience, have consistently been held to meet the probable cause standard for arrest. People v. Layne, 235 Cal. App. 2d 188, 193, 45 Cal. Rptr. 110 (1965); People v. Jefferson, 230 Cal. App. 2d 151, 40 Cal. Rptr. 715 (1964); People v. Clifton, 169 Cal. App. 2d 617, 337 P. 2d 871 (1959).

In People v. Bock Leong Chew, 142 Cal. App. 2d 400, 298 P. 2d 118 (1956), police, in the building on another matter, detected what they thought to be opium when they were passing outside defendant's apartment. Defendant's wife admitted them. The subsequent search, which turned up opium, was deemed valid. See also People v. Chong Wing Louie, 149 Cal. App. 2d 167, 307 P. 2d 929 (1957).

The odor of burning marihuana emanating from parked

cars and furtive motions of the occupants when approached, seen in light of police training and experience, have consistently been found to constitute probable cause for arrest and subsequent search incident thereto. See, e.g., People v. Sullivan, 242 Cal. App. 2d 767, 51 Cal. Rptr. 778 (1966); People v. Langley, 182 Cal. App. 2d 89, 5 Cal. Rptr. 826 (1960); People v. Tisby, 180 Cal. App. 2d 574, 5 Cal. Rptr. 614 (1960).

In People v. Sandoval, 54 Cal. Rptr. 123, 419 P. 2d 187 (1966) (en banc), cert. denied, 386 U. S. 948 (1967), the police had just arrested a woman with heroin in her possession leaving defendant's house. They knocked on the door; when the door was opened they detected a plastic bag lying in plain view on the floor inside. Their determination from outside the door that this bag contained narcotics was deemed sufficient probable cause for the arrest and search of the occupants.

It is submitted that the evidence in plain view to the officers who were legally on the premises, justified their belief that since a felony had been committed and was being committed in their presence, probable cause existed to arrest the defendant. Since the arrest was valid, the search of defendant's person, incident to the arrest was authorized by law, regardless of the fact that it turned up evidence of a crime unrelated to the one prompting the arrest. United States v. Rabinowitz, 339 U. S. 56, 60 (1950); Cotton v. United States, 371 F. 2d 385, 393-93, 394 (9th Cir. 1967); Taglavore v. United States, 291 F. 2d 262, 265 (9th Cir. 1961); Charles v. United States, 278 F. 2d 386, 389

(9th Cir. 1960). See also Davis v. United States, supra; United States v. Barone, supra.

B. THE TRIAL JUDGE DID NOT COMMIT PLAIN ERROR IN HIS STATEMENTS RELATING TO THE EXISTENCE OF A CONSPIRACY.

On Tuesday, November 14, 1967, the fourth day of trial, codefendant Deborah Saundra Karish testified on behalf of the Government. Shortly after beginning, the following took place between counsel for Hollyfield and the Court:

> "MR. MILLER: . . . Your Honor, I would like an instruction at this time on behalf of the defendant Hollyfield, I made it prior to the other witnesses, this woman testified she only recognized one defendant, any any admissions, confessions or extrajudicial context which attempts to reflect prejudicially to Mr. Hill is not to be prejudicial to my client Mr. Hollyfield. I would like the jury to be so instructed, that that testimony should only be applicable to Mr. Hill.
>
> "THE COURT: No, I won't do that. I think there is sufficient in the record at this time for a reasonable person to conclude that there was a conspiracy, and after there is a conspiracy at the appropriate time the jury will be instructed at length about the applicability of statements of one

co-conspirator against another." [R. T. 349-350].

Defense counsel in no way objected to this statement. It was quite obvious that the judge was not stating that there was, in his estimation, any guilt on the part of this defendant. Rather, the judge was ruling on the admissibility of evidence against this defendant, ruling that since the government had produced sufficient evidence of conspiracy, this evidence was relevant in light of the evidence of conspiracy. Thus, this comment, prompted by defense counsel's request, merely amounted to a ruling on evidence admissibility; in no way was defendant's complicity commented on. No defect existed sufficient to meet the standard of plain error. Federal Rules of Criminal Procedure, Rule 52(b).

Even if the judge's statement were to be construed as a comment on the evidence, it was within the wide scope allowed federal judges in this regard. See, e.g., Garrett v. United States, 382 F. 2d 768 (9th Cir. 1967); Thurmond v. United States, 377 F. 2d 448 (5th Cir. 1967); Jones v. United States, 361 F. 2d 537 (Cir. 1966); Franano v. United States, 310 F. 2d 533 (8th Cir.) cert. denied 373 U.S. 940 (1962); Petro v. United States, 210 F. 2d 49 (6th Cir. 1954), cert. denied 347 U.S. 978 (1955).

The judge instructed the jury in part that it was the sole judge of the facts, and that innocence is presumed until the Government shows defendant guilty as to each element, including conspiracy, beyond a reasonable doubt [R. T. 733-34]. The judge stated as part of an extensive instruction on conspiracy, that:

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by the evidence in the case as to his own conduct, what he himself wilfully said or did.

"Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements there after knowingly made and the acts there after knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member. . . .

"In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully became a member of the conspiracy.

"If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and

that the accused willfully became a member of the conspiracy either at the inception or beginning of the plan or scheme, or afterwards, and that thereafter one or more of the conspirators knowingly committed, in furtherance of some object or purpose of the conspiracy, one or more of the overt acts charged, then the success of failure of the conspiracy to accomplish the common object or purpose is immaterial." [R. T. 752, 753]

* * * * * *

"The law of the United States permits the Judge to comment to the jury on the evidence in the case. Such comments are only expressions of the Judge's opinion as to the facts, and the jury may disregard them entirely, since you as jurors are the sole judges of the facts in this case." [R. T. 762]

* * * * * *

". . . Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts." [R T. 764]

It is submitted that, far from "determining that the corpus delecti of the crime of conspiracy in Count One of the indictment has been proven beyond a reasonable doubt", [Appellant's Brief at 13] the Judge left this factual determination wholly to the jury.

Furthermore, since defendant's sentence on the conspiracy count was for a lesser time than the concurrent sentence imposed on the essentially unrelated substantive possession counts, even if the judge's comment was erroneous, it was harmless and does not constitute grounds for reversal.

Pasterchik v. United States, ___F. 2d ___ (9th Cir.) No. 21,645, September 20, 1968, Slip Op. at 9.

See also Sinclair v. United States, 277 U.S. 263, 299 (1929); Mendez v. United States, 349 F. 2d 650 (9th Cir. 1965) cert. denied 384 U.S. 1015 (1966).

CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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